No. 22507

United States
COURT OF APPEALS
for the Ninth Circuit

In the Matter of
PORTLAND NEWSPAPER PUBLISHING COMPANY, INC.,

Bankrupt,

R. ANTHONY DUBAY,

Appellant,

v.

EVERETTE H. WILLIAMS, Trustee in Bankruptcy of PORTLAND NEWSPAPER PUBLISHING COMPANY, INC.,

Appellee.

REPLY BRIEF OF APPELLANT R. ANTHONY DUBAY

On Appeal from the United States District Court for the District of Oregon

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A. The trustee concedes that the parties to the security agreement intended to assign to DuBay the fluctuating balances in certain named advertising accounts.

In opening brief DuBay contended that when the parties assigned the Montgomery Ward account (or

other named accounts) they intended to assign the fluctuating balance in that account, not merely the balance on the date of the security agreement.

The trustee in his answering brief to DuBay contends:

> "All demonstrative evidence indicates that they did not intend to assign 'future accounts.'" (Tr. Br. (DuBay) p. 7).

The conclusive reply to the trustee is that in his opening brief to Rose City in this same case, the same trustee concedes:

> "TESTIMONIAL EVIDENCE WOULD SEEM TO ESTABLISH THAT THE PARTIES INTENDED DAVIS AND DuBAY TO HAVE ALL ACCOUNTS WHICH BECAME OWING AT ANY TIME FROM THOSE NAMED ACCOUNT OBLIGORS (R. Tr. pp. 86, 88-90, 94, 155)." (Tr. Br. (Rose City) p. 46). (emphasis added)

B. The trustee concedes that the parties intended periodically to modify the agreement by assigning new advertising accounts.

In opening brief DuBay contended that the security agreement of July 31, 1962 was intended to be modified by later assignments of accounts on various dates up to April 21, 1964.

In the trustee's opening brief to Rose City in this same case, the same trustee concedes:

> "While the courts below held the procedure invalid, the uncontradicted testimony is that in

preparing the new lists the Reporter intended to comply with the DuBay and Davis agreements (R. Tr. pp. 41-44) * * *." (Tr. Br. (Rose City) p. 46).

These two concessions of the trustee mean that the admitted intention of Reporter and DuBay was to enter into a security agreement with periodic modifications which assigned the fluctuating balances in certain named advertising accounts. In the case of *In re Taylored Products, Inc.*, 5 U.C.C. Rep. 286 (D.C., W.D. Mich. Ref. op., 1968) cited by the trustee (Tr. Br. p. 7) the referee found no intention to assign future accounts.

The parties in our case intended that the word "account" have a meaning different than the definition of "account" later set forth in the Uniform Commercial Code. The facts are established. The question remains whether the intention of the parties can be carried out under Oregon law.

C. Contrary to the contention of the trustee, the DuBay agreement and its modifications were valid security agreements under the Uniform Commercial Code.

After the Uniform Commercial Code became effective in Oregon on September 1, 1963, DuBay took four affirmative actions:

1. September 30, 1963—DuBay filed a financing statement in accordance with Oregon law, signed by both parties, showing an assignment of accounts receivable and their proceeds (Ex. 3).

2. December 18, 1963—DuBay signed a guarantee agreement with the bank which pledged his general assets to the repayment of the Reporter loan (Ex. 16). This was new and additional value since the collateral pledge signed in June, 1962 limited DuBay's liability to the collateral which, of course, might fluctuate in value (Ex. 16).

3. November 30, 1963, February 24, 1964 and April 21, 1964—New assigned accounts were received by DuBay from Reporter (Tr. pp. 22-23).

4. March 6, 1964—At the conclusion of a week in which DuBay had required that the assigned accounts be paid directly to him by the account debtors, an agreement was signed between DuBay and Reporter which provided among other matters:

> "1. All agreements and assignments between the parties hereto, or any of them, are hereby affirmed and shall continue in full force and effect." (Ex. 39)

The trustee cites *Scott* v. *Stocker*, 380 F.2d 123 (10th Cir. 1967) for the proposition that "The mere filing of a financing statement after the effective date of the Code was ineffectual to validate that agreement." (Tr. Br. p. 14). In our case there was far more than "the mere filing of a financing statement." In addition there was a specific reaffirmation of the earlier agreements, after the effective date of the Code.

The DuBay agreement became valid after the September 1, 1963 effective date of the Code upon the

filing of the September 30, 1963 financing statement and execution of the March 6, 1964 reaffirmation agreement. It continued valid as modified after the April 21, 1964 assignment of new accounts by typed assignment memorandum and assignment stamp on the ledgers, coupled with the March 6, 1964 agreement of assignment of "future accounts receivable assigned or to be assigned pursuant to said agreements."

The trustee cites four cases which hold that a financing statement or a promissory note are not security agreements: *American Card Co., Inc.* v. *HMH Co.*, 97 R.I. 59, 196 A.2d 150 (1963); *Mid-Eastern Electronics, Inc.* v. *First National Bank of Southern Maryland*, 380 F.2d 355 (4th Cir. 1967); In re *Vielleux*, 5 U.C.C. Rep. 277 (D. Conn. Ref. op., 1967); *In re Fernandes Welding & Equipment Service, Inc.*, 5 U.C.C. Rep. 1 (1st Cir. 1968). In our case we have a security agreement, a series of modifications of the agreement and an agreement describing the security agreement and its modifications as assigning future accounts receivable.

The parties understood their agreement and acted under it for 27 months. Creditors had notice. The benefits of continued publication of Reporter went to those who received payment for goods and services. DuBay neither sought or received any benefit. To call such an arrangement a fraudulent preference misconstrues the whole purpose of the Bankruptcy Act.[1]

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[1] As done by other parties, DuBay incorporates by reference in this brief the arguments contained in Rose City's brief dealing with points not covered herein.

CONCLUSION

The decision of the referee should be reversed as to DuBay and DuBay should be awarded his security interest in the assigned accounts receivable in accordance with the admitted intention of the parties.

Respectfully submitted,

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